ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

RECEIVED
MAR 14 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TAQUAN L. BROWN,

APPELLANT

APPELLATE CASE NO. 2015-001447

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act where the Act provides immunity to a person who uses deadly force while removing another from his dwelling and who uses deadly force when he reasonably believes it is necessary to prevent imminent death or great bodily injury.

(A) Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act because Appellant was without fault in bringing on the difficulty and he shot the deceased in the curtilage of his residence while attempting to remove him from the property.

(B) Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act because Appellant actually and reasonably believed he was in imminent danger of losing his life or sustaining serious bodily injury.

II. The trial court erred in denying Appellant's motion for directed verdict where the undisputed evidence showed that Appellant shot the deceased in lawful self-defense and that Appellant was without fault in bringing on the difficulty, and that Appellant acted in reasonable fear of imminent death or great bodily injury.

STATEMENT OF THE CASE

On December 19, 2013, the Colleton County Grand Jury indicted Appellant Taquan Brown for murder, obstruction of justice, and possession of a weapon during the commission of a violent crime. R. (Indictments).

On June 22-25, 2015, Appellant proceeded to trial before the Honorable Perry M. Buckner and a jury. Matthew Walker represented Appellant, and Assistant Solicitor Tameka Legette represented the State.

The jury found Appellant guilty of voluntary manslaughter, obstruction of justice and possession of a weapon during the commission of a violent crime. Tr. p. 656, l. 16 - 657, l. 9. The trial court sentenced Appellant to a total of thirty years imprisonment. Tr. p. 669, ll. 1-22.

STATEMENT OF FACTS

Introduction

The material facts of this case are not in dispute. On November 20, 2013, at roughly four thirty in the morning, Maurice "Big Mo" Kemp was fatally shot by Appellant Taquan Brown in Brown's front yard. Minutes earlier Kemp had forced his way into Brown's apartment and torn it apart in a search for his ex-girlfriend, Courtney "Coco" Boulware. He located Boulware at the apartment of Brown's next door neighbor and friend, Nayronne Holmes. Kemp was irate.

Kemp was a convicted felon with reputation for violence. Tr. p. 20, ll. 4-23. On the night he was shot, Kemp was high on cocaine with a blood alcohol content of .137 and would test positive for marijuana. Tr. p. 191, ll. 13-24. Kemp, who had returned to his vehicle after forcing Boulware to leave with him, leapt out his car and charged towards Brown. He crossed into Brown's front yard threatening to either kill Brown or challenging Brown to kill him, while reaching into his waistband.

Gunshot residue evidence presented by the State indicated that Kemp may have been as close as two feet from Brown when he was shot. Brown testified that he feared for his life. Nevertheless, the trial court ruled that Brown was not entitled to immunity from prosecution under the Defense of Persons and Property Act and that the State had beyond a reasonable doubt disproven Brown's self-defense claim.

Relevant Facts

On November 13, 2013, a week before the shooting, Brown and Holmes were visiting Larry Council at the Southern Inn in Walterboro. Tr. p. 17, l. 8 -21, l. 10. During the visit, the group ran into Kemp, who also lived at the hotel. Holmes asked Kemp to tell Boulware, to stop calling him. *Id.*

Kemp became enraged that Boulware had a relationship with Holmes. Tr. p. 20, l. 2-3. Kemp demanded that the group leave the hotel and threatened to kill them if they mentioned Boulware again. *Id.* Kemp then menacingly showed them a pistol that he had in waist band. *Id.*

Pre-trial Immunity Hearing Pursuant to the Protection of Persons and Property Act

Brown proceeded to trial on June 22 - 25, 2015. The defense moved for a hearing to determine if Brown was entitled to immunity under Protection of Persons and Property Act ("the Act").

Brown testified that, at four in the morning on November 20, 2013, Kemp forced his way into his apartment. Tr. p. 33, l. 19 - 34, l. 18. Brown recalled that when Kemp saw him, "he start telling me that if he find out that Coco is in the house, he is going kill me and I'm a pussy, mother -- you know." Tr. p. 34, ll. 1-3.

Brown stated that Holmes came over to his apartment while Kemp was looking for Boulware in the apartment Holmes shared with his mother, Barbara Mays. Fearing Kemp, Holmes had brought his gun. Tr. p. 35, l. 3 - 37, l. 7. Brown refused to allow Kemp back in his apartment, forcing Kemp to walk around the side of the apartment building. Brown also took Holmes' pistol from him to avoid antagonizing Kemp, given his hatred for Holmes.

Brown, Holmes and others were already in the front yard when Kemp finished rounding the building as they had heard Barbara Mays calling for Holmes. Tr. p. 43, l. 14 - 44, l. 4. At the hearing Brown detailed what happened next:

> [H]e didn't drive away. After Ms. Barbara was talking about him kicking on the back door, and he got out - - Big Mo got out of the car, and was standing by the driver's door and called my name. He said, "Taquan, you bitch mother fucker. You tried to play me." I told Big Mo, I waved my hand and told him to go ahead on from around here. And when I told him to go ahead on from around here, he told me, "You think I'm playing with you?" I told him again, "Go on off

> from around here." So he came from around the back, the driver's door, to the front panel by the front tire, and then he started running towards me. And while he was running, he was reaching in his waistband. . . .

Tr. p. 37, ll. 7-20.

By the time he was shot, Kemp had crossed from the parking lot - which was separated from the apartment building's front yard by a sidewalk - into Brown's yard. Tr. p. 37, l. 21 - 38, l. 23. Brown estimated that Kemp was about twelve to thirteen feet away from him when he opened fire. Tr. p. 39, ll. 1-4.

Jermaine Brown, Brown's friend (no relation), testified that he had been asleep when Kemp burst into Brown's apartment "causing all type of chaos inside the house, running around" looking for Boulware. Tr. p. 46, l. 13-16. Kemp was yelling obscenities and threats while searching Brown's apartment. Jermaine saw Kemp "yelling at Taquan and all types of stuff. He was threatening him that he wanted to do something to him." Tr. p. 48, ll. 12-20. Jermaine Brown testified that Brown kept demanding Kemp leave. *Id.*

Jermaine stated that Kemp leapt from his car and "ran at Taquan like he was in the process of hurting him." *Id.* at ll. 21-25. Jermaine further recollected that Kemp appeared to be reaching or clutching something in his waistband as he ran towards Brown. Tr. p. 51, l. 3 - 53, l. 10.

Wylie James, who was also asleep at Brown' apartment, woke up to Kemp "tearing up" the apartment. Tr. p. 61, l. 10 - 62, l. 21. Kemp was "like, out of control. You couldn't calm him down, this and that. He was searching, tearing up [Brown's apartment] looking for Coco." *Id.*

James recalled that he, Brown, and the others were standing in Brown's front yard when Boulware and Kemp were getting into Kemp's car. *Id.* Kemp started "arguing back" to Brown, who was telling Kemp to leave. *Id.* In response, Kemp "started running back at [Brown], and started reaching, and that's when Taquan shot him." *Id.*

At the hearing, the defense also entered into evidence Kemp's autopsy report prepared by Dr. Erin Presnell of MUSC. Tr. p. 78, l. 13 - 79, l. 3; R. * (Defense Exhibit No.: 2). A toxicology report conducted by M & S Labs was also entered as an exhibit without objection. Tr. p. 79, ll. 12-24; R. * (Defense Exhibit No.: 3).

Finally, the defense entered, with the State's consent, the transcript of Lawrenzer Walker's guilty plea. Tr. p. 80, l. 3 - 83, l. 10. On January 20, 2015, Walker pled guilty to obstruction of justice before the Honorable Thomas W. Cooper, Jr. Assistant Solicitor Legette represented the State at the hearing. R. * (Defense Exhibit No.: 1).

Walker recounted that Kemp pushed his way through, over Walker's protests. Kemp erupted when he saw Brown, "he automatically was just getting on [Brown] saying oh he is going to do this and do that, well basically saying he is going to kill [Brown] if he finds that Coco . . . is in the house." R.* (Defense Exhibit No.: 1 p. 11, ll. 12-25).

Walker was in Brown's front yard and saw Kemp get out of his car while "talking stuff to" Brown. *Id.*at p. 10, l. 8 - 11, l. 10. Brown ordered Kemp off of his property. *Id.* "Big Mo said that what he was going to do was kill [Brown] and the he just started charging [Brown]. And that's when [Brown] you know pulled the trigger and he shot him until he fell." *Id.*

State's Witnesses

Sgt. Robert Edwards of the Colleton County Sheriff's Department was the first police officer to reach the scene. He testified for the State at the hearing. He testified that Kemp was laying facedown in Brown's front yard with his left leg extended forward when he arrived. Tr. p. 85, l. 23 - 86, l. 8. The driver's side car door was open. The keys were in the ignition. *Id.*

On cross-examination, Edwards stated that he was a firearms instructor for the Colleton Sheriff's Department. When asked, he explained that police officers are taught the "thirty foot

rule," which holds that: "[t]he closing gap on the average person approaching you at full speed is about 30 feet. That is your safest point at which you can draw your weapon and safely engaged an armed suspect approaching you with a weapon." Tr. p. 98, l. 3 - 99, l. 7.

Edwards agreed that if a deputy had told him that he had used deadly force on a three hundred pound man that had threatened and then charged at the deputy inside a thirty foot radius while reaching into his waist band; the use of deadly force would have been in-line with law enforcement training and justified. *Id.* On re-direct, Edwards stated that the pistol Brown used was in bad condition and generally unsafe to fire.

Captain Jason Chapman had taken photographs of the scene and made a series of measurements. By his measurements, Kemp was shot in Brown's yard, approximately thirty eight feet from the front door of Brown's apartment. *Id.* Kemp was also just under twenty feet from the front driver's side bumper of his car. *Id.* Chapman testified that police did not find a gun on Kemp at the scene of the shooting, but later located a .357 caliber revolver at his hotel room. Tr. p. 112, l. 14 - 113, l. 11.

SLED Trace Evidence Technician Whitney Berry conducted gunshot residue ("GSR") tests on samples provided to her by law enforcement. Berry stated that GSR residue kits from Walker and Brown both testified positive for GSR. Tr. p. 121, l. 5 - 123, l. 24. Samples taken of Kemp's hands also tested positive for GSR. *Id.* Berry testified that Kemp must have been very close to Brown, within two and half or three feet, for his hands to have GSR residue. *Id.*

Detective Nyle Eltzroth was the lead investigator of Kemp's shooting. He testified that everyone he initially interviewed - Holmes, Mays, Walker, and Brown - denied having any knowledge of Kemp's shooting. He alleged that a couple of days after the shooting a confidential informant told him that Boulware had knowledge of the shooting. Tr. p. 170, l. 16 - 171, l. 19.

Prior to Brown standing trial, Boulware died in a car accident in April, 2015. Eltzroth claimed that Boulware had told him Brown was walking down the sidewalk leading from the front door of his apartment to the parking lot with a pistol. Tr. p. 176, ll. 6-20. Eltzroth also stated that Boulware had said that Kemp saw the pistol and got out of his car.

Boulware explained to him that Kemp walked towards Brown yelling at Brown to shoot him. *Id.* Eltzroth conceded that Boulware's version of the shooting largely mirrored the version told by Brown and the other witnesses. Eltzroth rationalized his decision to charge Brown with murder as, "throughout my investigation with witnesses on scene, Taquan had come down the sidewalk towards the car, and at some point, come within a proximity of Mourice." Tr. p. 193, ll. 3-12.

Eltzroth seemed to conspiratorially believe that Brown may have somehow injected Kemp's dead body with cocaine, alcohol, and marijuana to further mislead the police. Tr. p. 191, ll. 13-24. Eltzroth conceded that he had concluded that Kemp was advancing on Brown when he was shot. However, Eltzroth adamantly denied ever stating during Brown's initial appearance that Brown acted reasonably and in fear of his life. Tr. p. 194, l. 1-6.

Court's Ruling

The trial court denied Brown immunity under the Act. The court ruled that Brown had failed to prove by a preponderance of the evidence that he acted in lawful self-defense. Tr. p. 196, l. 2-197, l. 19. Oddly, the court noted that "there's a conflict in the testimony there as whether or not [Kemp] actually ever threatened [Brown] or threatened others in yours client's presence." Tr. p. 198, ll. 7-10.

After taking additional arguments, the court reiterated that it did not believe Brown was entitled to immunity. Tr.p. 213, l. 16 - 215, l. 17. The court specified that it did not believe Brown

was without fault in bringing on the difficulty and that there was conflicting evidence about whether Brown actually believed he was in imminent fear of losing his life. *Id.*

Trial

Brown's trial proceeded in similar fashion to the immunity hearing. Dr. Presnell testified that Kemp tested positive for cocaine and marijuana. Tr. p. 306, ll. 1-20. Kemp also had a blood alcohol content of .137. *Id.* Dr. Presnell stated that is common for individuals who consume cocaine to be restless, to engage in risk-taking behaviors, and to become aggressive. Dr. Presnell testified that a combination of these drugs can cause impaired judgment. *Id.*

Trial Testimony of Barbara Mays

Mays did not testify at the castle doctrine hearing, but did testify before the jury. She recalled that, on November 20, 2013:

> I woke up. Bam, bam, bam, bam, bam, bam. There was bamming at my door. [Kemp] asked for a particular name, but I didn't know her name was different, so he said Coco. I opened the door and let him come through my house. They went outside. He was getting in the car, him and Coco was getting in the car. The next thing I heard, I went to the door, I was standing there, I heard noise, so I went to the door and the ***one thing I seen was the big guy running towards them*** and he said pow, pow, pow. That was it.

Tr. p. 315, ll. 1-11 (*emphasis added*). Mays recalled that Boulware was obviously afraid of Kemp. Tr. p. 321, l. 5-10; Tr. p. 334, l. 5- 335, l. 25. She was crying profusely and had to be urged into leaving with Kemp by Mays. Tr. p. 334, l. 5- 335, l. 25.

Mays was adamant that Brown, Walker, and Holmes were already standing in the front yard when Kemp rounded the building. Tr. p. 327, l. 9 - 329, l. 6. Mays could hear that Kemp was arguing with Brown and the others, but she could not hear what they were saying. Tr. p. 330, ll. 8-

20. Mays specifically recalled that "all of a sudden [Kemp] stopped and he started running toward the three guys who standing up there." Tr. p. 324, ll. 2-19; *see also* Tr. p. 335, l. 25 - 336, l. 3.

Trial Testimony of Nayronne Holmes

Holmes admitted he ran next door because he was afraid that Kemp was going to kill him for being with Boulware. Tr. p. 359, ll. 9- 14. Holmes also stated that he, Walker, and Brown were already in the front yard when Kemp rounded the building heading towards his car. Tr. p. 347, l. 6 - 348, l. 8.

Holmes recalled that Kemp was sitting in his car with the door open yelling at Brown. *Id.* Kemp then got out of the car and ran towards the group. "All he had to do was put it in reverse and back out." Tr. p. 351, ll. 3-7. On cross-examination, Holmes confirmed that Kemp had threatened Brown, Council, and Walker at the Southern Inn a week before the shooting and had presented a pistol. Tr. p. 354, l. 17 - 355, l. 23.

Holmes posited that Kemp had largely brought about his own demise, "I mean, at 4:30 in the morning, you're asking for a lot of trouble going to anybody's door, beating on it the way he beat on my mother's door." Tr. p. 360, ll. 10-15. Holmes did not remember Brown ever threatening Kemp, but conceded there was a lot of "trash talking". Tr. p. 361, l. 12 - 363, l. 15.

Trial Testimony of Detective Nyles Eltzroth

Eltzroth recounted his investigation and subsequent interview with Boulware. Eltzroth claimed that Brown had repeatedly denied having any "problems" Kemp, the incident at the Southern Inn notwithstanding. Tr. p. 446, l. 24 - 447, l. 23.

Despite not being at the scene of the shooting, Eltzroth was insistent that he somehow knew Brown had left his apartment and started walking towards Kemp and Boulware as Kemp was getting into his car. By contrast, all the eye witnesses agreed that Brown, Walker and Holmes were

already standing in the front yard when Kemp rounded the side of the building. Eltzroth conceded that Kemp got out of his vehicle and was either walking or running towards Brown before being shot. Tr. p.477, ll. 4-6.

At trial, Eltzroth made clear that his intention was always to charge Brown with murder: "the simple fact [was] that there was no evidence of Mr. Kemp being in possession of a gun ***or even threatening any deadly or serious bodily injury, and the fact that he was leaving, and there was no threat at that time.***" Tr. p. 461, ll. 21-25 (verbatim) (*emphasis added*).

This was quite a statement given the accounts of eye-witnesses to the shooting, the prior incident at the Southern Inn, the testimony on Kemp's violent reputation, Kemp's toxicology report, and the corroborating physical evidence; all of which tended to show that Kemp, who had repeatedly threatened to kill Brown after bursting into Brown's apartment at four thirty in the morning, left his car and charged at Brown rather than simply driving away with Boulware.

Eltzroth continued to state that Kemp could not have reasonably been considered a threat even when presented with an internal Colleton County Sheriff's Office memorandum advising officers to be careful around Kemp whom his fellow deputies had labeled: "caution - violent behavior." Tr. p. 475, ll. 8-19.

Defense's Motion for a Directed Verdict

The defense motioned for a directed verdict on the charge of murder and possession of a weapon during the commission of a violent crime arguing that the uncontroverted evidence presented during the State's case established that Kemp was shot at night while charging at Brown who was was standing in his own front yard. Tr. p. 517, l. 11 - 518, l. 3. There was no evidence that Brown had given Kemp legal provocation to attack him. *Id.*

Kemp weighed three hundred and seventy five pounds, had a reputation for violence, and Brown personally knew that Kemp had access to guns. *Id.* In response, the State relied on Detective Eltzroth's version of events where Brown "exited his home with a gun in his hand" and walked towards Kemp as he and Boulware were getting into Kemp's car. The State argued that by "talking trash" with Kemp, Brown had forfeited his right to self-defense. Tr. p. 519, l. 10 - 520, l. 18.

Oddly, the State conceded that Kemp left the safety of his car and charged at Brown, but maintained that Brown was not entitled to self-defense because Kemp was shot from a distance of only two to three feet. *Id.* The State argued that once Kemp had left Brown's apartment, Brown was obligated to retreat and hide from Kemp, until Kemp left. *Id.*

The court denied the directed verdict motion but stated that it intended to instruct the jury on self-defense and voluntary manslaughter. Tr. p. 521, ll. 6-23.

Defense Witnesses

Jermaine Brown testified for the defense that he "woke up to a big man around the house causing all kinds of chaos." Tr. p. 526, l. 1 - 527, l. 23. He recalled that he watched from across the street as Kemp "started talking all crazy things. Saying all type of things to Taquan. Eventually, he charged Taquan like he was in the process of wanting to harm him. Taquan shot him." *Id.*

Jermaine drove away after the shooting. *Id.* The defense then read Walker's guilty plea before the jury. Tr. p. 542, l. 10 - 551, l. 20. Larry Council also testified for the defense regarding Kemp's threats of violence at the Southern Inn. Tr. p. 559, l. 5 - 562, l. 22.

ARGUMENT

I. Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act where the Act provides immunity to a person who uses deadly force while removing another from his dwelling who uses deadly force when he reasonably believes it is necessary to prevent imminent death or great bodily injury.

Introduction

Prior to trial, Appellant moved for immunity from prosecution under the Protection of Persons and Property Act (the "Act"), S.C. CODE ANN. § 16-11-410 et al. The Act provides that "[a] person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: . . . (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred." § 16-11-440(A)(2).

In addition, the Act provides states, "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . ***has no duty to retreat and has the right to stand his ground and meet force with force***, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself." § 16-11-440(C) (*emphasis added*).

In signing the Act into law, the General Assembly stressed that, "no person or victim of crime should be required to surrender his personal safety to a criminal, ***nor should a person or victim be required to needlessly retreat in the face of intrusion or attack***." § 16-11-420(E) (*emphasis added*). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662

(2011).

Thus, to be entitled to immunity the defense must prove the following elements: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

The trial denied Appellant immunity under the Act because the court believed that Appellant was not without fault in bringing on the difficulty and that there was conflicting evidence "as to whether the defendant actually believed he was in imminent danger of losing his life . . . " Tr. p. 213, l. 16 - 214, l. 8. The trial court also noted that "there's a conflict in the testimony there as to whether or not [Kemp] actually ever threatened [Appellant] or threatened others in [Appellant's] presence." Tr. p. 198, l. 7-10.

(A) Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act because Appellant was without fault in bringing on the difficulty and he shot the deceased in the curtilage of his residence while attempting to remove him from the property.

An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Id.*

Here, Appellant was without fault in bringing on the difficulty. The evidence a trial established that, Kemp, weighing 375 pounds and high on cocaine, booze, and marijuana, stormed into Appellant's residence uninvited at four in the morning. Tr. p. 35, l. 3 - 37, l. 20; Tr. p. 191, l. 10-25.. Once inside Kemp threatened to kill Appellant and destroyed Appellant's home in his search for Boulware. *Id.*

Even if Appellant left his residence armed and was walking towards Boulware and Kemp while the two were leaving in Boulware's car, as the State claimed, there was still no evidence that this act was reasonably calculated to create a situation in which ***Kemp would leave his car and charge twenty feet across Appellant's yard.*** *See State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) ("mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense"); *Cf: State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) (defendant not without fault where he entered an on-going fight he was previously not involved in with a loaded weapon).

The eye-witnesses close enough to hear Appellant and Kemp, all agreed that Appellant was ordering Kemp to leave and that Kemp responded by threatening to kill Appellant or by taunting Appellant to shoot him. Tr. p. 48, ll. 11-23; *See State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." (*citing State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)).

Even in a light most favorable to the State, Appellant and Kemp were simply "talking trash" to one another, Kemp still chose to leave the safety of his car to charge at Appellant, who was standing in his own yard. *See State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232, n. 8 (2014) ([o]ne who merely does an action that affords an opportunity for conflict is not thereby precluded from claiming self-defense. Fault implied misconduct, not lack of judgment) (internal citations omitted);

see also: State v. Wiggins, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998)(the absence of a duty to retreat also extends to the curtilage of one's home, which includes the dwelling's yard).

Thus, Appellant had no duty to retreat in his own yard and did not "bring on the difficulty". § 16-11-440(A)(2). Kemp was the sole initiator of the difficulty and Appellant was allowed "to meet force with force". § 16-11-4 40(C). "All [Kemp] had to do was put it in reverse and back out," but instead he chose to attack Appellant. Tr. p. 351, ll. 5-7. Therefore, the court's determination that Appellant had brought the difficulty on himself was unsupported by the evidence and constituted an abuse of discretion. Tr. p. 213, l.19 - 214, l. 8.

(B) Appellant is entitled to immunity from prosecution for murder under the Protection of Persons and Property Act because Appellant actually and reasonably believed he was in imminent danger of losing his life or sustaining serious bodily injury.

In denying Appellant immunity, the trial court ruled that Appellant had failed to prove a by a preponderance of the evidence that he actually feared for his life when he shot Kemp. *Id.* This ruling also constitutes an abuse of discretion unsupported by the evidence presented at trial. Without question, Appellant believed he was in actual danger of losing his life or sustaining serious bodily injury. Moreover, a person of ordinary firmness would have entertained the same belief. *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011) (defendant entitled to directed verdict on self-defense where it was uncontroverted that decedent was highly intoxicated, acting aggressively, and advanced on defendant).

A person has the right to act on appearances, even if the person's belief is ultimately mistaken. *State v. Fuller,* 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." *State v. Starnes,* 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*citing State v. Hendrix,* 270 S.C. 653, 244 S.E.2d 503 (1978)). "[W]ords

accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." *Fuller,* 297 S.C. at 444, 377 S.E.2d at 331 (1989) (*quoting State v. Harvey,* 220 S.C. 506, 68 S.E.2d 409 (1951)).

In addition, under the Act, Appellant was entitled to a presumption that he had a reasonable fear of imminent peril of death or great bodily injury because he was removing Kemp from his residence. Tr. p. 37, ll. 7-20; § 16-11-410(A)(2); *Cf: State v. Curry*, 406 S.C. 364, 752 S.E.2d 364 (2013) (social guest not entitled to presumption because decedent had equal right to be in residence). The State did nothing to refute this presumption. In several instances, such as the testimony of SLED technician Berry regarding GSR residue, the testimony of Barbara Mays, and the expert testimony of Sgt. Edwards' on the thirty foot rule, the State's witnesses reinforced the reasonableness of Appellant's fear.

Further, the court's ruling that there was a "conflict in the testimony" about whether Kemp ever threatened Appellant was totally at odds with the evidence presented at trial. Tr. p. 213, l. 19 - 214, l. 8. Every eye witness to the incident at the Southern Inn on November 13, 2013, testified that Kemp threatened to kill anyone that asked him about Boulware. Even Detective Eltzroth did not dispute that the incident occurred. Tr. p. 447, l. 4 - 448, l. 14.

Rather he absurdly argued that, while Kemp had concededly flashed a gun at Brown and the others, this did not constitute a threat to Brown because Kemp had not actually pointed the gun at him. *Id.* Whether Kemp pointed a gun at the group or showed them a gun while telling them he was going to kill them is a distinction without a difference. *Id.; see State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (2014) (defendant entitled to immunity for fatal shooting of his lifelong friend during a fight because there was evidence that defendant reasonably believed shooting his friend was necessary to avoid imminent injury or death).

The other pillar of the State's argument was that Brown had purportedly told Eltzroth that he and Kemp did not have "any problems" prior to the night of the shooting. *Id.* The State contended that with this admission, Brown had necessarily conceded that he did not fear for his life Kemp when Kemp charged at him at 4:30 in the morning.

The State's argument was a ludicrous and willful misinterpretation of Appellant's meaning. Even the evidence most adverse to the defense showed that, Appellant was among those threatened by an armed Kemp at the Southern Inn, but that Kemp was particularly angry at Holmes for his relationship with Boulware. *See Douglas*, 411 S.C. 307, 768 S.E.2d 232.

Appellant feared for his life and reasonably so. As Appellant stood in his darkened front yard at four thirty in the morning, he had every reason to believe that he was in imminent danger of death or great bodily injury. *State v. Gandy,* 113 S.C. 147, 148, 101 S.E. 644 (1919) (a man, may act on appearance, even if mistaken). A three hundred seventy-five pound convicted felon, high on cocaine who owned a pistol and had just a week earlier threatened to kill anyone found with his prostitute ex-girlfriend, was charging at him while reaching into his waist band after having earlier barged into Appellant's apartment uninvited and finding said prostitute ex-girlfriend in the company of Appellant's friend and neighbor.

Whatever level of credibility the court assigned to the witnesses, with their changing stories and criminal records, it was an abuse of discretion based on the uncontroverted physical evidence and undisputed testimony to conclude that Appellant did not actually and reasonably fear for his life when he shot Kemp. Accordingly, the trial court erred in denying Appellant's motion for immunity from prosecution under the Act.[1]

[1] Appellant's conviction for obstruction of justice arises out of his statements to police during their investigation into Kemp's shooting. Therefore, if Appellant is entitled to immunity from prosecution under the Act, immunity should extend to the obstruction of justice charge.

II. The trial court erred in denying Appellant's motion for directed verdict where the undisputed evidence showed that Appellant shot the deceased in lawful self-defense and that Appellant was without fault in bringing on the difficulty, and that Appellant acted in reasonable fear of imminent death or great bodily injury.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When a defendant asserts an affirmative defense, such as self-defense, the prosecution must disprove the elements of the defense beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544 -45, 500 S.E.2d 489, 492-493 (1998).

As argued at length above, Appellant was without fault in bringing on the difficulty and was in actual, reasonable fear of imminent death or bodily injury. Even when viewing the evidence in a light most favorable to the State, the prosecution failed to prove beyond a reasonable doubt that Appellant unlawfully shot and killed Kemp. *Dickey*, 394 S.C. at 499-501, 716 S.E.2d at 101-102; (directed verdict proper where defendant was lawfully ejecting decedent); *Hendrix*, 270 S.C. at 657-658, 244 S.E.2d at 505-506 (defendant confronted on his own land had no duty to retreat and was entitled to a directed verdict on self-defense).

The evidence presented at trial established that Appellant was without fault in bringing on the difficulty. The difficulty began when Kemp forced his way into Appellant's apartment at four in the morning. It continued, uninterrupted until Kemp got out of his car and was shot while charging at Appellant, who was standing in his own front yard. The proximate cause of Kemp's death was his decision to charge at Appellant. *See State v. Goodson*, 312 S.C. 278, 440 S.E2d 370 (1994) (state must prove beyond a reasonable doubt that defendant's unlawful act was reasonably calculated to bring on the difficulty and the proximate cause of the homicide).

The State also failed to prove beyond a reasonable doubt that Appellant did not believe he was in imminent danger of losing his life or sustaining serious bodily injury where Kemp was likely

between two and twelve feet away from Appellant and reaching into his waist band when he was shot. Tr. p. 20, ll. 4-23. In South Carolina, a person has the right to act on appearances. *Starnes*, 340 S.C. at 911-912, 531 S.E.2d at 319-320.

In *Dickey*, this Court held that a defendant security guard was entitled to a directed verdict on self-defense when he fatally shot a man he was lawfully ejecting from an apartment building. The Court determined that the defendant's reasonably believed he was in actual danger of death or serious bodily injury because he was "faced with an attack by a belligerent, intoxicated, more agile, and younger male, who appeared to be reaching for a weapon." *Dickey*, 394 S.C. at 502, 716 S.E.2d at 102. The Court specifically noted that the aggressor was "undeterred at the sight of Petitioner's gun." *Id.*

Like the defendant in *Dickey*, Appellant also testified that he was afraid for his life and believed Kemp was reaching for a weapon. Tr. p. 37, ll. 7-20; *see also State v. Lockamy*, 369 S.C. 378, 384, 631 S.E.2d 555, 558 (Ct. App. 2006) (had defendant struck the final blow while in imminent danger, then self-defense would apply, but where the threat had moved fifty feet away by the time defendant opened fire, defendant could no longer use self-defense). Kemp had threatened to kill Appellant just a week before the shooting and was high on alcohol and cocaine when he was shot.

With a three hundred seventy five pound convicted felon charging him while reaching into his waist band, Appellant acted as a reasonably prudent person would. When confronted with similar facts, the Court concluded in *Hendrix* that the only logical conclusion to be drawn from the circumstances was that they were such as to warrant a reasonable person to strike the fatal blow. *Hendrix*, 270 S.C. at 660, 244 S.E.2d at 507 (holding the trial court erred in failing to direct a

verdict in the defendant's favor concerning the charge of murder as the evidence established the defendant acted in self-defense).

In *Hendrix*, the deceased arrived at the defendant's lake house, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." *Id.* at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. *Id.* Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under any version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." *Id.*

If the Court concluded that Hendrix acted reasonably when the testimony differed as to whether the deceased actually pointed his gun in Hendrix's direction, then Appellant was justified in acting in self-defense given Kemp's hostile behavior on November 20, 2013 and the November 13, 2013 incident at the Southern Inn.

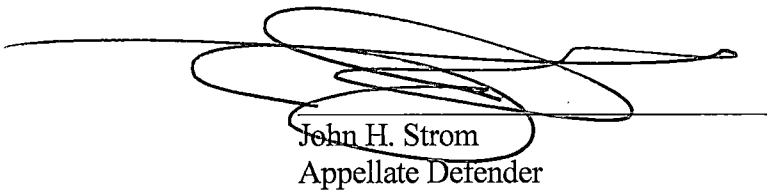
As Appellant was standing in the curtilage of his residence, he had no duty to retreat in the fact of Kemp's charge. *Hendrix*, 270 S.C. at 659-660, 244 S.E.2d at 506 (defendant, who armed himself on his own property, was without fault in bringing on difficulty and had no duty to retreat). Moreover, given how close Kemp was to Appellant when Appellant shot him and the gross disparities in size between the two of them, it would have been highly unlikely that Appellant could have safely retreated.

Accordingly, the trial court erred in not finding as a matter of law that the circumstances would warrant a reasonable person to strike the fatal blow to save himself. In addition, the trial court erred in not finding as a matter of law that Appellant actually and reasonably believed Kemp posed a danger to him and was without fault in bringing on the difficulty.

CONCLUSION

Based on the foregoing reasons, Appellant is entitled to a grant of immunity from prosecution under the Protection of Persons and Property Act or, in the alternative, that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TAQUAN L. BROWN,

APPELLANT

APPELLATE CASE NO. 2015-001447

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of March, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2016.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.